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**IN THE
COURT OF APPEALS OF INDIANA**

DAMON MANSFIELD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-0608-CR-654

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0512-FC-213620

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Damon Mansfield appeals the four-year aggregate sentence that he received, following a guilty plea, for three counts of class C felony forgery and two counts of class D felony theft. We affirm.

Issue

We restate the issue as whether the trial court abused its discretion in sentencing Mansfield.

Facts and Procedural History

The State recited the following factual basis at Mansfield's guilty plea/sentencing hearing:

If this matter had gone to trial the State would have proven beyond a reasonable doubt that on December 8th, 2005, [Mansfield] first went to 8150 Rockville Road where [he] successfully cashed check number 79990 on the account of Becker Law Office for the amount of two thousand eight hundred and ninety-seven dollars and forty-two cents, at approximately 2:00 p.m. that day. [He] then went to the Fifth Third Bank at 2802 Lafayette Road where [he] successfully cashed another check, this time number 79991, also on Becker Law Office account, for the amount of twenty-nine forty-eight and twenty-two cents. And, thirdly, [he] went to the Fifth Third Bank at 5692 North Georgetown Road where [he was] unsuccessful in forging a check under the account of Becker Law Office, check number 79992, for the amount of thirty-four hundred dollars and ninety-six cents. The employees at the Fifth Third at Georgetown Road called the police with the forgery in progress. [He] tried to run, but [he was] caught, and then they realized that [he] had also forged the other ones at the other two locations. [He] did not have permission to write these checks on the Becker Law Office account. This did occur in Marion County and is contrary to the laws in the State of Indiana.

Tr. at 17-18.

On December 9, 2005, the State charged Mansfield with three counts of class C felony forgery, two counts of class D felony theft, and one count of class D felony attempted theft.

On July 14, 2006, Mansfield signed a plea agreement whereby he agreed to plead guilty to the forgery and theft charges. The State agreed to dismiss the attempted theft charge and to recommend a sentence with a cap of four years executed, with full restitution.

At the guilty plea/sentencing hearing on that date, the trial court found as an aggravating circumstance Mansfield's "lengthy history of criminal or delinquent activity[.]" virtually all of which occurred in his home state of Kentucky, and noted that his probation had been revoked at least twice.¹ *Id.* at 23. The trial court found as an additional aggravating circumstance that Mansfield was on parole when he committed the instant offenses. The trial court found as a mitigating circumstance that Mansfield had "accepted responsibility and avoided the cost and necessity of trial." *Id.* at 25. The trial court further stated,

All told, I find that the aggravators outweigh the mitigators, so that normally imposition of, of a sentence above the advisory term would be warranted. However, given the fact that previous attempts at probation in the State of Kentucky have not been successful, I simply don't see the need to expend Indiana resources on probation with him. So I will simply impose the advisory term on all five Counts without probation thereafter.

Id. The court imposed four-year advisory sentences on the class C felony forgery convictions and eighteen-month advisory sentences on the class D felony theft convictions, all concurrent. Mansfield now appeals.

Discussion and Decision

At the guilty plea/sentencing hearing, Mansfield's counsel proposed the following mitigating circumstances for the trial court's consideration: (1) Mansfield's guilty plea; (2)

the nonviolent nature of the charged offenses; (3) his willingness to pay restitution; and (4) his work history. *Id.* at 21. Mansfield acknowledges that the trial court specifically found his guilty plea to be a mitigating circumstance but argues that the court improperly overlooked the remaining proposed mitigators.

Initially, we observe that Indiana Code Section 35-38-1-3 provides that if a trial court finds aggravating circumstances or mitigating circumstances at sentencing, it must make a statement of its “reasons for selecting the sentence that it imposes.” Nonetheless, a trial court may impose any sentence that is authorized by statute or permissible under the Indiana Constitution “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). We further observe that except in circumstances not applicable here, a trial court “is not required to use an advisory sentence” in sentencing a defendant. Ind. Code § 35-50-2-1.3(b); *see also* Ind. Code § 35-50-2-1.3(a) (“For purposes of sections 3 through 7 of this chapter [which enumerate the sentencing terms for felonies], ‘advisory sentence’ means a guideline sentence that the court may *voluntarily* consider as the midpoint between the maximum sentence and the minimum sentence.”) (emphasis added).

In *Gibson v. State*, 856 N.E.2d 142 (Ind. Ct. App. 2006), we noted that the 2005 amendments to Indiana’s sentencing scheme raised

a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing

¹ According to the presentence investigation report (“PSI”), Mansfield “has received the benefit of Conditional Discharge, as well as Probation/Parole supervision on six prior occasions, which resulted in three revocations, dispositions of two probation terms are unknown, and one probation/parole violation is pending.” PSI at 10.

statements, and appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old "presumptive" sentencing scheme is unclear.

Id. at 146.

Even assuming, absent guidance from our supreme court, that we must assess the accuracy of a trial court's sentencing statement, we conclude that Mansfield's argument is without merit.

With respect to mitigating factors, it is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance. Given this discretion, only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the sentencing court has abused its discretion by overlooking a mitigating circumstance. Although the court must consider evidence of mitigating factors presented by a defendant, it is neither required to find that any mitigating circumstances actually exist, nor is it obligated to explain why it has found that certain circumstances are not sufficiently mitigating. Additionally, the court is not compelled to credit mitigating factors in the same manner as would the defendant. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant *and* clearly supported by the record.

Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (citations omitted).

As for the nonviolent nature of the charged offenses, we agree with the State that "it is hard to imagine how a bad check could be presented violently[,]" that presumably the legislature considered the nature of forgery and theft in determining the penal consequences for those crimes, and that "there is no reason whatever that the court should have considered the non-violent nature of the offenses as favoring a downward departure from the advisory sentence." Appellee's Br. at 3, 4. With respect to his willingness to pay restitution,

Mansfield makes the curious argument that the trial court should have given this more consideration because the victimized bank did not send a representative to the sentencing hearing or write a letter urging the imposition of a certain sentence. We fail to see what one has to do with the other. Moreover, as the State suggests, Mansfield's stated willingness to pay restitution means little in light of his past failures to comply with conditions of probation. Regarding his work history, Mansfield makes no specific argument on appeal and has thereby failed to establish an abuse of discretion. *See Pennington*, 821 N.E.2d at 905 (concluding that defendant's statement that trial court improperly overlooked mitigator "does not rise to the level of proof needed to show that the proposed mitigating circumstance is both significant *and* clearly supported in the record.").

Finally, Mansfield argues for the first time on appeal that the trial court should have imposed a lesser sentence because the charged offenses "were so inextricably linked that the court should have considered such evidence in mitigation to warrant sentence terms below the advisory[.]" Appellant's Br. at 6 (typography altered). This argument is both nonsensical and waived.² *See Pennington*, 821 N.E.2d at 905 ("A defendant who fails to raise proposed mitigators at the trial court level is precluded from advancing them for the first time on appeal."). Having found no abuse of discretion, we affirm Mansfield's sentence.³

² Mansfield likens his crime spree to an "episode of criminal conduct" pursuant to Indiana Code Section 35-50-1-2, which limits "the total of the consecutive terms of imprisonment" for nonviolent criminal convictions arising out of such an episode, despite acknowledging that his forgeries and thefts do not constitute an "episode of criminal conduct" and that he received concurrent sentences.

³ In the standard of review section of his brief, Mansfield notes that we have the constitutional authority to review and revise sentences pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Affirmed.

SHARPNACK, J., concurs.

SULLIVAN, J., concurs in result.

Nevertheless, Mansfield's argument focuses specifically on the trial court's consideration of mitigating circumstances, rather than on the nature of the offenses and his character, and we have addressed his argument accordingly. In any event, given Mansfield's extensive criminal history, that he committed the instant offenses while on parole, and that the trial court did not abuse its discretion in rejecting Mansfield's proposed mitigators, we find no grounds for revising Mansfield's sentence pursuant to Appellate Rule 7(B).